No. 01-1581

In the Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

DAVID KOLKER
Assistant General Counsel

HARRY J. SUMMERS
Federal Election Commission
Washington, D.C. 20463
(202) 694-1650

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the three-judge district court correctly dismissed appellant's as-applied constitutional challenge to the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 6
Buckley v. *Valeo*, 424 U.S. 1 (1976) 4, 14, 15, 19, 19
FEC v. *Beaumont*, 539 U.S. 146 (2003) 3, 6
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 3, 4
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 3
First Nat'l Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 17
Goland v. *United States*, 903 F.2d 1247 (9th Cir. 1990) 17
Heffron v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) 17
McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*
Pipefitters v. *United States*, 407 U.S. 385 (1972) 3

Statutes and regulation: Page

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 201(a), 116 Stat. 88 ..... 6, 14, 15
§ 203, 116 Stat. 91-92 ..... 2, 5, 9, 10, 11, 15
§ 403(a)(1), 116 Stat. 114 8
Federal Election Campaign Act of 1971, 2 U.S.C. 431-455 (2000 & Supp. II 2002) 2
2 U.S.C. 431(17) 4
2 U.S.C. 434(f)(3)(A)(i)(I) (Supp. II 2002) 9
2 U.S.C. 434(f)(3)(A)(i)(III) (Supp. II 2002) 6
2 U.S.C. 437(f)(3)(A)(ii) (Supp. II 2002) 11
2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. II 2002) 6
2 U.S.C. 437c(b)(1) 2
2 U.S.C. 437f 2
2 U.S.C. 437d(a)(7) 3
2 U.S.C. 437d(a)(8) 2
2 U.S.C. 438(a)(8) (Supp. II 2002) 2
2 U.S.C. 438(d) 2
2 U.S.C. 441b 4
2 U.S.C. 441b(a) 3
2 U.S.C. 441b(b) 5
2 U.S.C. 441b(b)(2) (2000 & Supp. II 2002) 3, 6
2 U.S.C. 441b(b)(4)(A)-(C) 3
26 U.S.C. 501(c)(4) 7
11 C.F.R. 114.10 ..... 4, 8

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MOTION TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion and order of the district court dismissing appellant's complaint (J.S. App. 1a-3a) is unreported. A prior opinion of the district court denying appellant's request for preliminary injunctive relief (J.S. App. 4a-12a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 10, 2005. A notice of appeal was filed on May 12, 2005, and was docketed on May 25, 2005. The jurisdictional statement was filed on May 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 203, 116 Stat. 91-92, that prohibits corporations from using their general treasury funds to pay for any communication—called an "electioneering communication"—that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (2000 & Supp. II 2002). This Court recently sustained BCRA § 203 against a facial constitutional challenge, holding that the provision is neither overbroad nor underinclusive. *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). Appellant subsequently filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court denied appellant's request for preliminary injunctive relief, J.S. App. 4a-12a, and subsequently dismissed appellant's complaint, *id.* at 1a-3a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. II 2002), and other federal campaign-finance statutes. See J.S. App. 4a. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8); 2 U.S.C. 438(a)(8) (Supp. II 2002) and (d);

and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and non-profit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a "political action committee" or "PAC," to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. II 2002). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation " 'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to federal candidates or used to pay for independent expenditures to communicate to the general public the corporation's views on candidates for federal office.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on using corporate treasury

funds to finance independent expenditures for speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210 ("Our decision in *MCFL* related to a carefully defined category of entities."); 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. 479 U.S. at 248-249; see 2 U.S.C. 431(17) (2000) (pre-BCRA version). The Court had introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. "[T]hose examples eventually gave rise to what [became] known as the 'magic words' requirement," *McConnell*, 540 U.S. at 191, under which communications not using such terms were

frequently held not to be covered by federal restrictions on corporate election-related expenditures.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. Corporations and labor unions crafted political communications that avoided explicit words of electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[A]lthough the resulting advertisements [did] not urge the viewer to vote for or against a candidate in so many words, they [were] no less clearly intended to influence the election." *Id.* at 193. "Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (2000 & Supp. II 2002). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general

election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, (2 U.S.C. 434(f)(3)(A)(i)(III) (Supp. II 2002)).[1] That prohibition does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications from that fund. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. II 2002).

3. In *McConnell*, this Court upheld the provision at issue in this case against constitutional challenge. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162, and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Ibid.* (quoting *Beaumont*, 539 U.S. at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted). The Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy from a PAC apply equally to their financing of electioneering communications. *Id.* at 206.

[1] BCRA excludes from that definition (i) a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), (2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. II 2002)). The definition also does not encompass corporate- or union-financed print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

The Court held that the constitutional inquiry did not turn on the "precise percentage of [past] issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose." *McConnell*, 540 U.S. at 206. The Court stated that "the vast majority of ads" run during the 30- and 60-day intervals between federal primary and general elections "clearly had such a purpose." *Ibid.* The Court found it decisive, however, that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. Appellant Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. Appellant's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code, and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. paras. 20, 22; see J.S. App. 4a. Appellant asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation"

under 11 C.F.R. 114.10, which implements the *MCFL* exception. See J.S. App. 4a. Appellant administers its own separate segregated fund for campaign-related activity. See *id.* at 5a.

United States Senator Russell Feingold of Wisconsin, a Democrat, ran for reelection in 2004. J.S. App. 5a. "In March 2004, [appellant's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* "In a news release on July 14, 2004, [appellant] criticized Senator Feingold's record on Senate filibusters against judicial nominees." *Ibid.* On July 26, 2004, appellant began to use its corporate funds to finance the airing of three broadcast advertisements critical of the filibusters that identified Senator Feingold by name. *Id.* at 6a, 13a-17a.

5. On July 28, 2004, appellant filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to appellant's advertising disbursements. J.S. App. 6a. Appellant sought a preliminary injunction barring enforcement of the statute against it. *Ibid.* Appellant "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 5a. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

The district court denied appellant's request for a preliminary injunction. J.S. App. 4a-12a. In holding that appellant had not established a substantial likelihood of success on the merits, the district court ex-

plained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds before us." *Id.* at 7a. The district court observed that this Court in *McConnell* had expressly declined to address the "backup definition" of "electioneering communication" set forth in 2 U.S.C. 434(f)(3)(A)(i)(I) (Supp. II 2002) because the Court had upheld "*all applications of the primary definition.*" J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73). The district court also noted that, in contrast to *McConnell*'s discussion of BCRA § 203, the Court had explicitly acknowledged that *other* challenged parts of BCRA might be subject to future as-applied challenges. J.S. App. 7a-8a.

The district court further explained that its "reading of *McConnell* that as-applied challenges to [2 U.S.C.] § 441b are foreclosed is but one reason [the court] f[ou]nd little likelihood of success on the merits." J.S. App. 8a. In addition, the court found that the specific facts of this case "suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellant] and [appellant's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing

> opponents seeking to unseat a candidate whom [appellant] names in its broadcast advertisements, and the PAC announcing as a priority "sending Feingold packing."

Id. at 8a-9a (citations omitted).

The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. J.S. App. 1a-3a. The court held, "for the reasons set forth in [the preliminary-injunction] opinion," that appellant's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." *Id.* at 2a-3a.

ARGUMENT

Appellant contends that BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications" is unconstitutional as applied to the advertisements aired by appellant in July 2004, and to "grass-roots lobbying communications generally." See J.S. i. Because appellant's constitutional challenge is squarely foreclosed by this Court's decision in *McConnell*, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. As the district court explained in denying appellant's request for preliminary injunctive relief, the "reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds" here. J.S. App. 7a. Contrary to appellant's contention (J.S. 12), this Court in *McConnell* did not "brush[] aside concerns about 'genuine issue ads.'" Rather, the Court directly confronted the contention that BCRA § 203 is unconstitutional because of its potential to burden issue advertisements that are not intended to influence federal elections. While acknowledging that BCRA § 203

might encompass some such advertisements, the Court squarely held that the provision is constitutional in *all* its applications. In reaching that conclusion, the Court recognized that BCRA § 203 imposes only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal elections, and that the establishment of an objective bright-line rule was essential to the achievement of Congress's objectives.

a. This Court's opinion in *McConnell* states in three different places that BCRA § 203's restrictions on the funding of "electioneering communications" are constitutional in *all* of their applications. First, the Court noted that BCRA contains two alternative definitions of the term "electioneering communication": a primary definition (which is the subject of appellant's challenge in this case), and a "backup" definition that would take effect if the primary definition were held to be unconstitutional. *McConnell*, 540 U.S. at 190 n.73 (citing 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002)). The Court stated that, because it had upheld "all applications of the primary definition" against the plaintiffs' constitutional challenge, the Court "accordingly ha[d] no occasion to discuss the backup definition." *Ibid.*

Later in its opinion, the Court summarized its treatment of BCRA § 203. The Court described its analysis of that provision as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition." *McConnell*, 540 U.S. at 239. Finally, in addressing the plaintiffs' claim that the electioneering-communication provision is overbroad, the Court expressly held that BCRA's financing restrictions are constitutional even as applied to "genuine issue

ads." In rejecting the plaintiffs' overbreadth challenge, the Court explained:

> This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose. *Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.*

Id. at 206 (emphasis added; citations omitted).

Appellant's understanding of *McConnell* as permitting appellant's as-applied constitutional challenge is inconsistent not only with the three passages discussed above, but with the broader context of the Court's decision. The parties to that case recognized that BCRA's primary definition of "electioneering communication" encompasses at least some advertisements that are not intended to influence federal elections, while disagreeing about the constitutional significance of that fact.

The plaintiffs contended that such advertisements comprise a sufficiently large percentage of the total communications covered by BCRA § 203 as to render the provision unconstitutional on its face. See, *e.g.*, Br. for Senator Mitch McConnell, et al. at 49-57, *McConnell* v. *FEC*, *supra*, (No. 02-1674, et al). The statute's defenders, by contrast, argued that the plaintiffs' overbreadth challenge should be rejected because "BCRA's primary definition of 'electioneering communications' is narrowly tailored to advance several different compelling government interests," Br. for Federal Election Commission, et al. at 105, *McConnell* v. *FEC*, *supra* (No. 02-1674, et al.), and because the "electioneering communication" provisions impose only minimal burdens on the corporate and union advertisers to which those provisions apply, *id.* at 106. This Court's categorical rejection of the plaintiffs' overbreadth challenge, unaccompanied by any suggestion that the acknowledged prophylactic scope of BCRA's "electioneering communication" provisions could provide the basis for a subsequent as-applied constitutional attack, precludes appellant's current claim that its advertisements are immune from federal regulation because they fall outside the heartland of Congress's concern.[2]

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[2] The government's brief in *McConnell* argued that, "[t]o the extent that the definition [of 'electioneering communication'] is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis." Br. for Federal Election Commission, et al. at 105-106, *McConnell* v. *FEC*, *supra* (No. 02-1674, et al.). The principal thrust of the government's argument regarding the "electioneering communication" provisions, however, was that BCRA's primary definition of that term is valid because of the importance of the government interests served by those provisions and the minimal nature of the burdens they impose. See generally *id.* at 103-112. In any event, the Court's opinion in *McConnell*

There is consequently no basis for appellant's contention (J.S. 17) that the Court in *McConnell* "acknowledge[d] that *some* issue ads may not constitutionally be regulated" by Congress. The Court did recognize that at least some prior advertisements falling within BCRA § 201(a)'s definition of "electioneering communication" were not actually intended to influence federal elections. Far from suggesting that BCRA's financing restrictions were unconstitutional as applied to such advertisements, however, the Court stated that corporate and union speakers could comply with the law "by simply avoiding any specific reference to federal candidates" or "by paying for the ad from a segregated fund." 540 U.S. at 206. The Court's description of the legal alternatives open to future corporate advertisers is wholly inconsistent with appellant's current contention that, so long as it does not intend to influence federal elections, it is constitutionally entitled to use general treasury funds to finance advertisements falling within BCRA's definition of "electioneering communication."

2. Recognition of an as-applied constitutional challenge along the lines suggested by appellant would substantially undermine Congress's effort to develop an objective bright-line rule for identifying the election-related advertisements that may not be financed with corporate and union treasury funds. This Court in *Buckley* introduced the "express advocacy" test in order to ensure that earlier FECA provisions—including a provision that limited disbursements "for the purpose of

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did not identify future as-applied challenges as a possible means of addressing the acknowledged (and unavoidable) inclusions in the statutory definition of the communications outside the heartland of Congress' concerns.

* * * influencing" a federal election—were not intolerably vague. See *Buckley*, 424 U.S. at 43-44, 77-80. Based on subsequent experience under the campaign-finance laws, however, Congress concluded, and the evidentiary record in *McConnell* amply demonstrated, that "*Buckley*'s magic-words requirement" had become "functionally meaningless." *McConnell*, 540 U.S. at 193. That was so, the Court in *McConnell* explained, both because advertisers can "easily evade the line by eschewing the use of magic words," and because advertisers employing modern persuasive techniques "would seldom choose to use such words even if permitted." *Ibid.*; see *id.* at 127 & n.18, 193 n.77.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 201(a)'s definition of the term "electioneering communication" is "both easily understood and objectively determinable." *Ibid.* The criteria specified in BCRA § 201(a) correlate closely, though not perfectly, with intent to influence federal elections. See *id.* at 206 (Court finds that the "vast majority" of prior advertisements encompassed by the definition "clearly" had an "electioneering purpose"). BCRA §§ 201(a) and 203 thus prevent wholesale evasion of pre-existing restrictions on corporate and union campaign-related spending, while "rais[ing] none of the vagueness concerns that drove [the Court's] analysis in *Buckley*." *Id.* at 194.

Appellant's approach would reintroduce the indeterminacy that Congress and this Court have sought to dispel. Appellant identifies 16 separate factors that purportedly "indicate that [its] broadcast ads are authentic grass-roots lobbying and not electioneering." J.S. 5; see J.S. 5-6. Appellant does not make clear whether it views all 16 factors as necessary to establish entitlement to a

constitutional exemption, or whether a smaller subset of those factors would suffice. Nor does appellant identify any principled reason that another litigant would be precluded from relying on additional factors suggesting that a particular advertisement was not intended to influence federal elections and/or would not have that effect. If appellant's approach were adopted, the permissibility of corporate and union disbursements would turn on the same sort of unstructured inquiry that the Court in *Buckley* found constitutionally problematic, and that Congress in enacting BCRA carefully sought to avoid.[3]

In addressing constitutional challenges to other FECA provisions, this Court has recognized the value of bright-line rules in preventing evasion of the statute's anti-corruption purposes and in furnishing clear guidance to regulated entities. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court

[3] The Court in *MCFL* held that the pre-BCRA prohibition on the use of corporate treasury funds for campaign-related expenditures cannot constitutionally be applied to a narrow class of corporations having specified characteristics. See pp. 3-4, *supra*; see also *McConnell*, 540 U.S. at 209-211 (construing BCRA to incorporate the prior exemption for *MCFL* organizations). Appellant stated in its complaint, however, that it does not qualify for that exemption. See J.S. App. 4a. The exemption recognized in *MCFL* turns on an objective and readily administrable assessment of the organization's structure and overall activities, and can be understood as a means of identifying a subset of corporations for which a separate segregated fund for campaign-related expenditures would be unduly burdensome. Respondent's proposal for as-applied constitutional challenges, by contrast, would enmesh the courts in formless inquiries into the purposes of individual disbursements and the content of specific communications.

held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified uniform application of the $1000 individual contribution limit. *Id.* at 29-30. The Court's analysis clearly foreclosed future as-applied challenges to the contribution limits brought by well-intentioned donors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to receive special influence in return.[4] Where, as here, recognition of a particular class of as-applied challenges to a bright-line rule would undermine Congress's interest in clarity and predictability, there is nothing anomalous or unprecedented about foreclosing such challenges.

3. Appellant contends (J.S. 24-27) that the district court's refusal to entertain its as-applied challenge to BCRA § 203 is inconsistent with this Court's recognition, in *McConnell* and prior decisions, of a constitutional distinction between regulation of "lobbying" and regulation of "electioneering." That argument reflects a misunderstanding of the rationale for Congress's adoption of an objective bright-line rule.

The Court in *McConnell* reaffirmed the proposition, previously established in such cases as *First National*

[4] See *Goland* v. *United States*, 903 F.2d 1247, 1258-1259 (9th Cir. 1990) (contributions are subject to FECA limits even if a contributor keeps his identity a secret by using straw donors, thereby allegedly precluding the opportunity to exert undue influence); cf. *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654 (1981) ("any such exemption [from a rule limiting certain solicitation activities to physical locations] cannot be meaningfully limited to [the plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern").

Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978), that "unusually important interests underlie the regulation of corporations' campaign-related speech." 540 U.S. at 206 n.88. Appellant is therefore correct that any federal interest in regulating corporate issue advocacy *as such* is of considerably less magnitude than is the interest in regulating corporate *campaign* spending. But neither Congress's adoption of a bright-line rule, nor the district court's refusal to entertain appellant's as-applied constitutional challenge, reflects the view that regulation of corporate issue advocacy is desirable for its own sake. Rather, any restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's efforts to prevent corporate treasury funds from being used to influence federal elections. Recognizing the strength of the federal interest in preventing actual or apparent electoral corruption, the need for clarity as to the range of communications subject to the financing restrictions, the futility of prior efforts to identify all relevant election-related communications through the "express advocacy" test, and the minor burden that BCRA § 203 places upon corporate and union speakers that wish to engage in issue advocacy but do not seek to influence electoral outcomes, the Court in *McConnell* sustained that provision against constitutional attack. See pp. 11-14, *supra*. Thus, even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy, the marginal impact of BCRA § 203 on such communications would not render the provision unconstitutional, either on its face or as applied.

4. As the district court indicated in denying preliminary injunctive relief, appellant would have little likelihood of establishing its entitlement to an exemption from BCRA § 203 even if an as-applied constitutional challenge were consistent with the Court's decision in *McConnell*. See J.S. App. 8a ("The facts suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating."). Appellant's PAC had previously endorsed the opponents of the candidate named in its broadcast advertisements about the filibuster of judicial nominees (Senator Feingold), and the PAC had announced that "sending Feingold packing" was one of the organization's priorities. *Id.* at 9a. While appellant's advertisements may well have been intended in part to affect congressional activity, the circumstances suggest that the communications were also intended to further the organization's stated objective of defeating Senator Feingold.[5]

Although the three advertisements that were the subject of appellant's original complaint can now be broadcast in Wisconsin without regard to BCRA § 203 until the next Senate election is imminent, appellant has provided no evidence that it has run such advertisements after last November's elections or that it has specific plans to do so, notwithstanding the fact that the issue discussed in the advertisements (Senate filibusters of judicial nominees) was a focus of particularly intense

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[5] The fact that appellant's advertisements included discussion of an issue before the Senate does not control the constitutional analysis. Most electoral advertisements discuss issues of public importance, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42.

public interest during the spring of 2005 and remains a topic of widespread public concern. Before this Court, appellant states only that it "intends to do similar grassroots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period." J.S. 7. That chain of events is similar to the pattern that preceded and prompted Congress's passage of BCRA, see *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."), and it reinforces the inference that appellant's advertisements were in the heartland of Congress's concern.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER
Associate General Counsel
DAVID KOLKER
Assistant General Counsel
HARRY J. SUMMERS
Federal Election Commission

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